

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
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)	
Retention by Broadcasters of)	MB Docket No. 04-232
Program Recordings)	

To: Office of the Secretary
Attention: The Commission

**JOINT COMMENTS OF
COSMOS BROADCASTING CORPORATION
COCOLA BROADCASTING COMPANIES
INDEPENDENCE TELEVISION COMPANY
MEREDITH CORPORATION
PAXSON COMMUNICATIONS CORPORATION**

Cosmos Broadcasting Corporation, Cocola Broadcasting Companies, Independence Television Company, Meredith Corporation, and Paxson Communications Corporation (collectively, the "Joint Broadcasters"), by their attorneys, hereby submit these Joint Comments on the Commission's *Notice of Proposed Rule Making* ("*Notice*") in the above-captioned proceeding. In the *Notice*, the Commission proposes to require that broadcasters create and retain recordings of their programming to improve the Commission's enforcement of statutory restrictions on obscene, indecent, and profane broadcast programming, and perhaps certain additional regulatory provisions. The Joint Broadcasters strongly oppose the Commission's proposal. As demonstrated herein, recent Commission rule and policy changes already provide sufficient incentives to record and maintain recordings of broadcast programming in those rare instances in which objectionable content might be broadcast over the airwaves. To impose a new burdensome rule mandating recordings of virtually all broadcast programming is akin to firing a cannonball to strike a house fly. Indeed, the Joint Broadcasters submit that the Commission's proposal is nothing short of punitive bureaucratic overkill and, if adopted, will affirmatively disserve the public interest.

The Joint Broadcasters own and operate television stations in markets ranging in size from New York, Atlanta, and Louisville to Boise, Jonesboro, and Wausau-Rhineland. Their television stations include high-powered VHF television stations affiliated with the major networks, independent low power television stations that broadcast local programming such as high school sporting events, and most every variation in between these two extremes. Consequently, the Joint Broadcasters collectively can offer the Commission the benefit of extensive and broad expertise in television broadcasting. Despite their myriad experiences, however, the Joint Broadcasters have all concluded that the Commission's proposal in this docket is as unnecessary as it is unwise.

I. The Commission's Current Policies Render Its Proposed Retention Requirement Unnecessary.

First and foremost, the Commission's proposed retention requirement is unwarranted. Broadcasters already have Commission-created incentives to retain recordings of their broadcasts when such recordings are likely to invite Commission scrutiny. Moreover, recordings of actual broadcasts are unnecessary for the Commission's assessment of complaints alleging objectionable programming violations. Requiring broadcasters to retain recordings of their programming, therefore, would unnecessarily encumber all broadcasters to produce, at best, a negligible benefit.

The Commission's current policies on evaluating viewer and listener complaints already create more than sufficient incentives for broadcasters to retain records of their programming when appropriate. Under the Commission's policies, the burden of proof effectively favors complainants who provide a relatively limited description of the program in question. In such cases, unless broadcasters can affirmatively disprove the allegation through a recording or otherwise, the Commission may conclude that broadcasters "failed to rebut" the allegations and therefore have

violated the Commission's content standards.¹ The Commission properly recognized in the *Notice* that, as a result of this Commission policy, broadcasters may now find it in their interest to retain recordings on their own – and to do so for a longer period than the Commission currently proposes. In short, the Commission already effectively has imposed on broadcasters an unwritten obligation to record broadcasts and retain the recordings to defend against future investigations.

The Commission's recent shift to harsher penalties for indecent, obscene, and profane broadcast programming also provides incentives for broadcasters to retain recordings of any potentially objectionable programming. As Chairman Michael Powell noted approximately six months ago, this Commission "boasts the most aggressive enforcement regime in decades, proposing nearly ten times the level of indecency fines than the previous Commission."² Indeed, this Commission has proposed some of the largest fines in the Commission's indecency enforcement history, including a proposed fine of over \$700,000 against Clear Channel stations for indecency violations.³ With the possible enactment of the Broadcast Decency Enforcement Act of 2004, which would increase maximum fines, and this Commission's stepped-up enforcement efforts, including its threats of license revocation for objectionable programming violations,⁴ the Commission's penalties

¹ See, e.g., *Clear Channel Broadcasting Licenses, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1768 (2004).

² *Before the United States Senate Committee on Commerce, Science, and Transportation and the House Energy and Commerce Committee, Subcommittee on Telecommunications and the Internet* at p. 3 (Feb. 11, 2004) (statement of Michael K. Powell, Chairman, Federal Communications Commission) ("*Powell Statement*").

³ *Id.* at pp. 3-4.

⁴ See, e.g., *Clear Channel Broadcasting Licenses, Inc. et al.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 6773 (2004) (finding broadcasters apparently liable for maximum statutory forfeiture amount for each apparent indecency violation and reminding licensees of potential license revocation for serious repeated cases of indecency violations); *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 19 FCC Rcd 4975 (2004) (determining use of the "F-Word" during live broadcast indecent and profane and putting broadcasters on notice of potential

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for such violations are providing significant incentives to record broadcasts of potentially objectionable content.

The Commission's retention proposal also is unwarranted because the Commission does not require recordings of a challenged broadcast as part of its evaluation of a complaint. Rather, a complainant need only submit a "significant excerpt" of the program in question.⁵ Indeed, so long as the complaint provides sufficient information regarding the words and language used and the meaning and context of those words and language,⁶ great flexibility exists in how a complainant may provide information regarding what was said or depicted on air. As the Commission has noted, "[O]ur practice that complainants provide a tape, transcript or significant excerpt is not a requirement, but a general practice used by the Commission to assist in the evaluation of indecency complaints."⁷ The Commission can and typically does act on complaints that provide merely limited descriptions of the challenged program.⁸ In addition, tapes or transcripts of the actual broadcast are not necessary for the Commission's assessment of complaints, as the Commission has granted

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enforcement action for similar use). *See also Powell Statement* at pp. 3-6 (describing the Commission's recent enforcement efforts).

⁵ *See Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, ¶ 24 (2001).

⁶ *See Infinity Broadcasting Corporation of Los Angeles*, Memorandum Opinion and Order, 17 FCC Rcd 9892, ¶ 14 (2002).

⁷ *Infinity Broadcasting Corporation of Los Angeles*, Memorandum Opinion and Order, 16 FCC Rcd 6867, ¶ 11 (EB 2001) (subsequent history omitted) ("*Infinity Order*").

⁸ *See, e.g., Emmis FM License Corp. of Chicago*, Forfeiture Order, 17 FCC Rcd 493 (EB 2002) (subsequent history omitted) (finding complaint which quoted few exact words of the broadcast and provided brief descriptions (the accuracy of which the broadcaster did not challenge) sufficient to support an indecency determination). *See also Infinity Order* at ¶ 7 (accepting complainant's uncontradicted statement that she heard certain words as probative evidence that a particular version of a song was played).

viewer/listener complaints that included merely a transcript of the language allegedly broadcast.⁹ As such, complaints that do not provide tapes or transcripts of the actual broadcasts can and often do provide enough detail for the Commission to determine whether enforcement action is warranted.

Indeed, the Commission's own data confirm that most complainants provide sufficient evidence. Based on the figures set forth in the *Notice*, only approximately 1.175% of complaints received by the Commission between 2000 and 2002 were denied or dismissed for an insufficient record. Accordingly, those broadcasters likely to face viewer/listener complaints already should find it in their interest to retain recordings as a measure of self-protection because the Commission effectively places the burden of proof on complainants and the penalties may be huge. These broadcasters should be free to decide on their own – that is, without a one-size fits all government mandate – whether and under what circumstances their programming should be recorded. Given the Commission-created incentives and policies, the Commission's recording retention proposal is wholly unnecessary and therefore should not be adopted.

II. The Commission's Proposal Would Unfairly Burden Broadcasters.

The Commission should not impose new, unnecessary regulatory obligations on all broadcasters merely to obtain a small improvement in its ability to police the bad acts of a few broadcasters. The vast majority of radio and television stations never have, and likely never will, broadcast indecent, obscene, or profane material over the airwaves. Indeed, the bulk of the Commission's indecency complaints arise from a narrow category of syndicated and network entertainment programming, not from local, public affairs, children's, sports, religion, or home shopping programming. For example, in 2003, the Commission received 240,350 complaints

⁹ See, e.g., *Infinity Order* at ¶ 11 (finding transcript of song obtained from commercial recording provided sufficient context to warrant further consideration of complaint).

addressing 318 programs; all but 513 of those complaints focused on nine shows, including episodes of Fox's "Keen Eddie" and NBC's "Coupling."¹⁰ More recently, between the beginning of January and the end of February 2004, the Commission received 530,885 complaints addressing 23 shows; all but 57 of those complaints focused on CBS' Super Bowl halftime show.¹¹

As such, requiring all broadcasters to record essentially all programming for possible objectionable material would be bureaucratic overkill. Moreover, most complaints involve network or syndicated programs. Because networks or syndicators already can provide the Commission with recordings as necessary, local broadcasters' duplicative recordings of syndicated and network programming would be simply unnecessary. The Commission's proposal is therefore overly broad because it imposes unwarranted and burdensome requirements on a class of regulatees that, as a whole, comply fully with the Commission's programming guidelines.

The Joint Broadcasters submit that the burdens imposed by the Commission's proposal would be material, not only for small market broadcasters, but also for large television operations that broadcast (and therefore would need to record) multiple programming streams (*i.e.*, analog, primary digital, and multicast streams). The staff costs and logistical issues of recording, storing, and indexing could also be quite significant as requests from private parties multiply in the aftermath of a new Commission recording requirement.

Finally, the Commission's proposed timelines for retention of broadcasters' recordings (*e.g.*, 60 days or 90 days) would prove to be a "double-edged sword." If the Commission adopts a 60 day or 90 day deadline for retaining recordings, the Commission may begin to request, as a routine practice, recordings of programming challenged in virtually all complaints, including clearly

¹⁰ Chris Baker, *TV complaints to FCC soar as parents lead the way; Watchdog group monitors programs, issues alerts*, THE WASHINGTON TIMES, May 24, 2004, at A01.

¹¹ *Id.*

frivolous complaints, simply so that the Commission would not miss its deadline for production of recordings. On the other hand, if the Commission maintains its current pace of initiating investigations several months after the alleged violation, broadcasters may find it necessary to retain recordings well beyond any deadline eventually established by the Commission. As such, any deadline would be useless and only serve to burden broadcasters further. In either event, it would not be unreasonable to expect the Commission to sanction broadcasters for failing to produce complete and accurate recordings, even where deficiencies resulted from inadvertent human error and/or simply mechanical failures.

In the end, the Commission's new rule would very likely lead to a major shift in how the Commission handles broadcast complaints, effectively placing a burden on broadcasters to disprove any and all allegations brought against their programming. These burdens vastly outweigh the negligible increase in information that would become available to the Commission from adoption of its broadcast recordings proposal.

Conclusion

The Commission's "shot-gun" approach to a problem caused by a very small number of broadcasters unfairly and unjustifiably burdens all broadcasters. The Commission's current policies provide more than sufficient incentives for broadcasters to voluntarily tape and record any potentially objectionable programming. The Commission also can and typically does act on complaints that only provide limited descriptions of any objectionable programming. As such, there is no overriding or imminent threat to the Commission's ability to evaluate complaints that warrants imposition of the Commission's burdensome and far-reaching proposal, the effects of which would extend well beyond the Commission's enforcement of indecency standards. Accordingly, the Commission's broad brush approach would unnecessarily burden broadcasters without substantially improving the enforcement regime the Commission seeks to strengthen.

Respectfully submitted,

COSMOS BROADCASTING CORPORATION
COCOLA BROADCASTING COMPANIES
INDEPENDENCE TELEVISION COMPANY
MEREDITH CORPORATION
PAXSON COMMUNICATIONS CORPORATION

By: 

John R. Feore, Jr.

John S. Logan

Kevin P. Latek

Their Counsel

DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000

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